ARAB-MALAYSIAN BANK BHD

v.

AMALAN TEPAT SDN BHD & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: MT1-22-03-2001]
23 MAY 2003

CIVIL PROCEDURE: *Summary judgment - Principles and procedure - Principles enunciated in National Company For Foreign Trade v. Kayu Raya Sdn Bhd - Preliminary requirements for application under O. 14, Rules of the High Court 1980 - Whether satisfied - Whether prima facie case established - Whether there were bona fide triable issues - Whether case ought to go on full hearing*

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether bona fide triable issues raised - Whether case ought to go on full hearing to resolve triable issues - Rules of the High Court 1980, O. 14*

This was an appeal by the appellant/plaintiff against the decision of the learned registrar who had dismissed the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980 ('Rules') against the respondents/defendants. The plaintiff bank had commenced proceedings by way of summary procedure against the defendant after the defendant's default on repayment of a term loan facility granted by the plaintiff bank. The principle issue in determination was whether there were *bona fide* triable issues to be resolved which merited a full hearing.

Held:

[1] On the basis of the principles enunciated in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd*, the preliminary requirements for the purpose of an application under O.14 of the Rules were satisfied. Therefore, the plaintiff had established a *prima facie* case and the burden was thus, cast on the defendants to rebut the *prima facie* case. The defendants were able to do so by setting up a *bona fide* defence or raising a *bona fide* triable issue, although a complete defence need not be shown. (pp 309 c-h, 310 a-b)

[2] The plaintiff had given a notice of variation of the rate of margin of interest to the defendants. On this issue, the defendants did successfully raise not only the question as to whether service of such notice is a pre-requisite to the variation of the rate of the margin of interest but also the question of

whether such rate of interest applied prospectively or retrospectively. Clearly, these questions were arguable issues that could only be resolved at a full hearing, being *bona fide* triable issues. (pp 310 d & 311 d-e)

[3] It was not disputed that the plaintiff and the first defendant had agreed to a restructuring of the term loan. Therefore, the restructuring would have created new rights and obligations which were to be read as integral parts of the original loan agreement. Subsequently, the question as to whether there may have been a premature recalling of the term loan by the plaintiff was certainly an arguable triable issue. (pp 311 h-i & 312 g)

[4] There were apparent discrepancies in the rates of interest and thus, the amounts which the plaintiff claimed as being entitled to could not be resolved by way of summary procedure under O. 14 of the Rules. (p 313 a)

[5] The defendants had established that the plaintiff's case was not plain and obvious for the purpose of obtaining summary judgment. It is only where the issues are clear that the O. 14 procedure would apply. Thus, the learned registrar's decision in dismissing the plaintiff's application for summary judgment was correct and affirmed. (p 313 c-d)

[Appeal dismissed.]

Case(s) referred to:

Arab Malaysian Finance Bhd v. Sukma Villa Sdn Bhd & Ors [2002] 1 CLJ 391 HC ***(dist)***

Arab-Malaysian Merchant Bank Bhd & Ors v. Court Square Pelita Sdn Bhd & Ors [2000] 5 MLJ 273 HC ***(not foll)***

Hong Leong Finance Bhd v. Rextex Rubber Products (M) Sdn Bhd & Anor [1996] 4 CLJ 580 HC ***(foll)***

Lee Wah Bank Ltd v. Joseph Eu [1981] 1 MLJ 11 ***(foll)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 2, O. 34

For the plaintiff - Mohd Azlisham; M/s Abd Aziz Chen & Co
For the defendants - Andrew KC Ng; M/s Yeo & Yeo

Reported by Raja Vishnu Sivarajah

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant-plaintiff ("plaintiff) against the decision of the learned registrar who had on 14 March 2002 dismissed with costs the plaintiff's application in encl. (7) for summary judgment against the respondents -defendants ("defendants") under O. 14 of the Rules of the High Court 1980.

Plaintiff's Claim

The plaintiff is a bank of which the first defendant is its customer who had taken a term, loan facility of RM10 million pursuant to a loan agreement executed between the plaintiff and the first defendant on 5 August 1997 containing, *inter alia*, the following relevant terms and conditions:

(a) the prescribed rate of interest at 2.25% above the plaintiff's base lending rate at 9.3% per annum on monthly rest;

(b) an additional interest of 1% on the arrears of payment; and

(c) the plaintiff is entitled to recall the term loan facility if the first defendant fails to comply with the terms of repayment of the arrears due and owing to the plaintiff.

This term loan was by agreement between the plaintiff and the first defendant restructured on 3 August 1999. I shall revert to this later in this judgment.

On 5 August 1997, the plaintiff executed a charge document in respect of the land held under HS(D) 5380 PT No. 1662 Mukim Pegoh, Daerah Alor Gajah in favour of the plaintiff by way of security for the term loan facility.

Pursuant to a guarantee agreement executed by the second to the sixth defendants on 5 August 1997, they have agreed to guarantee the repayment by the first defendant to the plaintiff of the term loan facility.

The plaintiff alleged that the first defendant has failed to comply with the terms of repayment and had *vide* letter dated 2 March 1998 to the first defendant recalled the term loan facility.

The plaintiff *vide* letter dated 2 May 1998 demanded from the first defendant a sum of RM10,363,888.41 as at 31 March 1998 together with interest at 4% per annum above the plaintiff's base lending rate at 12.2% per annum, and additional default interest of 1% thereon with effect from 1 April 1998 until full realisation.

The plaintiff's solicitors *vide* letter dated 23 August 2000 to all the defendants recalled the restructured term loan facility and demanded the repayment of RM10,447,858.89 as at 31 July 2000.

In encl. (7), the plaintiff prays for summary judgment for RM10,411,959.53 as at 19 December 2000 together with interest at 2.5% per annum above the plaintiff's base lending rate at 6.8% per annum from 20 December 1998 until full realisation and additional interest at 1% on the aforesaid sum.

Submissions By Counsel And Decision On Appeal

Relevant Principles Governing O. 14 Judgment

In relation to the allegations of fact deposed to in the affidavits filed herein, it is appropriate to refer to some of the relevant principles governing the entering or otherwise of summary judgment under O. 14.

Seah FJ in delivering the judgment of the Federal Court in *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 eludicated as follows:

> ... For the purposes of an application under Order 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
>
> ...
>
> ... If ..., these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see Order 14 Rules 3 and 4(1)).

A perusal of the cause papers revealed that the defendants herein entered appearance on 28 March 2001, the statement of claim having been served on the defendants and the plaintiff's affidavit having complied with O. 14 r. 2.

In the circumstances, the burden is now cast on the defendants to rebut the *prima facie* case.

The defendants may do so by setting up a *bona fide* defence or raising a *bona fide* triable issue, though a complete defence need not be shown. Whether or not a defence is *bona fide* or an issue is *bona fide* triable depends on the facts or the law arising from each case. The court is not to delve into the merits of the issues raised by the defendants or whether the defendants are likely to succeed or fail: *Hong Leong Finance Berhad v. Rextex Rubber Products (M) Sdn. Bhd. & Anor*. [1996] 4 CLJ 580 per Abdul Malik Ishak J and the cases cited there.

Variation Of Interest Without Notice

En. Mohd Azlisham, learned counsel for the plaintiff, submitted that the defendants' affidavits have never raised this issue of variation of interest.

As an alternative, he contended that the plaintiff did give a notice of variation of the rate of margin interest from the original 2.25% to 4% in the letters dated 2 March 1998 and 2 May 1998, while by the plaintiff's letters of demand dated 25 July 2000, 23 August 2000 and 19 December 2000, the subsequent rate of margin interest was 2.25%, adding that there was no requirement for prior notice to effect variation of interest.

The reply by En. Andrew KC Ng, learned counsel for the defendants, was that the plaintiff's failure to give prior notice of the variation of margin interest has run foul of s. 4.04 of the loan agreement and that this is a triable issue.

The learned registrar accepted the submission for the defendants.

In my judgment, it is to be observed that para. 5 of the defendants' statement of defence avers, *inter alia*, that the plaintiff's claim for the outstanding sum was wrong in law and in fact.

Two affidavits were affirmed by the fourth defendant on his own behalf and, as authorised, on behalf of the other defendants on 5 and 27 July 2002, which are encls. (9) and (11) respectively.

In para. 12 of encl. (9), the fourth defendant affirmed that the plaintiff has contravened the terms of the loan agreement by prematurely recalling the term loan and that the outstanding sum claimed "adalah tidak dijelaskan secara khusus dan tidak dipastikan" (is not specifically explained and ascertained).

The defendants' aforesaid pleading and affidavits are in my view sufficiently wide to enable the defendants' learned counsel to raise the submission pertaining to the variation of the rate of margin interest, pursuant to which the terms of the loan agreement would be called into question for consideration by the court.

At this juncture, it is necessary to refer to the relevant portion of s. 4.04 of the loan agreement as follows:

> **Section 4.04 Variation of Interest Rate**
>
> Notwithstanding the provisions relating to the Bank's ... Margin as hereinabove stated, the Bank shall be entitled, at any time and from time to time, to vary at its discretion, the Bank's ... Margin **by serving a notice in writing on the Borrower of such of its intention in the following manner:**
>
> (i) ...;
>
> (i) in respect of the Margin ... **by serving a notice in writing on the Borrower of the change in the Margin** ...;
>
> and such amended Rate of Interest shall be applicable as from the date specified in such notice ... . (emphasis added)

Upon a proper construction of s. 4.04(ii), it is clear to me that it contains the proper procedure to be followed by the plaintiff in order to vary the rate of margin interest. At this stage of the proceedings, by reference to s. 4.04(ii), I am of the view that the defendants have at least successfully raised not only the question as to whether service of such notice is a pre-requisite to the variation of the rate of margin interest but also the question of whether such rate of interest applies prospectively or retrospectively. These questions are clearly arguable issues which can only be resolved at the full hearing, being *bona fide* triable issues.

The judgment of Syed Ahmad Helmy JC in *Arab Malaysian Finance Bhd v. Sukma Villa Sdn Bhd & Ors* [2002] 1 CLJ 391 cited in support of the plaintiff's case is not a summary judgment under O. 14, but a judgment delivered after a full trial wherein *viva voce* evidence was considered and evaluated. I am of the view that this judgment not being an O. 14 judgment would appear to militate against the plaintiff's application for summary judgment. Conversely, it is supportive of the defendants' contention calling for a full hearing to resolve these triable issues.

In the circumstances, I hold that the learned registrar is correct in rejecting the argument advanced for the plaintiff.

Premature Recall Of Term Loan

Plaintiff's learned counsel argued that pursuant to plaintiff's letter dated 3 August 1999 to the first defendant as in exh. G of encl. (6), the plaintiff and the first defendant have agreed to a restructuring of the term loan, in particular cl. 14 thereof which provides for the terms of repayment as follows:

REPAYMENT (CLAUSE 14)

a) Monthly interest servicing;

b) By way of twenty (20) equal successive quarterly principal repayments of RM500,000.00 each **with the first to commence on 1st November 2000**. (emphasis added)

He added that since the first defendant has defaulted in the payment of interest, the plaintiff has *vide* letter dated 23 August 2000 to the first defendant recalled the loan, relying on s. 10 (a) of the loan agreement.

It was submitted for the defendants that pursuant to the agreed restructuring of the term loan, its purported recall on 23 August 2000 was premature as the first quarterly principal repayment of RM500,000 each was only to commence on 1 November 2000.

The learned registrar held that the plaintiff's premature recall of the restructured term loan is a triable issue.

In my judgment, the terms and conditions contained in the agreed restructuring of the term loan as stated in the plaintiff's letter dated 3 August 1999 to the first defendant are binding on the parties herein and so the original loan agreement has been amended or modified thereby. This is a case of an express amendment or modification of the term loan.

I am unable to uphold the contention for the plaintiff that it was an amendment or modification of a written agreement by way of implied terms. Hence, the plaintiff's reliance on the judgment of Ian Chin, J in *Arab-Malaysian Merchant Bank Bhd & Ors v. Court Square Pelita Sdn Bhd & Ors* [2000] 5 MLJ 273 pertaining to, *inter alia*, the amendment or modification of a written agreement by implied terms cannot be sustained.

The binding agreed restructuring of the term loan would in my view create new rights and obligations which have been incorporated and are to be read as integral and essential parts of the original loan agreement, in the light of which the question as to whether there is a premature recalling of the term loan by the plaintiff is clearly an arguable triable issue. In the circumstances, I hold that the learned registrar is correct in arriving at that conclusion.

Apparent Discrepancies In Plaintiff's Claim

As has been averred in para. 12 of the defendants' affidavit in encl. (9), and having regard to the contemporary documents of the plaintiff as stated above in the plaintiff's claim, it is clear that there are apparent discrepancies in the rates of interest and hence the amount or amounts which the plaintiff claims

as being entitled to for the purposes of obtaining summary judgment. Such discrepancies can only be resolved by way of mature consideration pursuant to *viva voce* evidence subject to cross-examination and re-examination and obviously not by way of summary procedure under O. 14.

Arguable Issues

The defendants' allegations of fact in the defence and the two affidavits clearly have raised numerous arguable issues as detailed above. The defendants have therefore rebutted the plaintiff's *prima facie* case or have at least established that the plaintiff's case is not plain and obvious for the purpose of obtaining summary judgment. It is only where the issues are clear that the O. 14 procedure applies: *Lee Wah Bank Limited v. Joseph* [1981] 1 MLJ 11.

Conclusion

On the foregoing grounds, I am satisfied that the learned registrar's decision in dismissing plaintiff's application for summary judgment is correct and is hereby affirmed.

This appeal is hence dismissed with costs. I further direct the parties to proceed with the necessary application for case management under O. 34.